

A National Emergency on the Border?

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President Trump continues to give constitutional lawyers a lot to think about. Every few months, in response to an Executive Order, an interview, or a tweet, we must ask again: “Can he really *do that*?” Can the President ban immigration from a set of predominantly Muslim countries? Could he fire Special Counsel Robert Mueller at will? Could he end birthright citizenship by executive order?

Sometimes, the answer turns out to be yes: by a vote of five to four, the Supreme Court [upheld](#) a version of the so-called “Muslim ban.” Sometimes, as with firing the Special Counsel, the better answer is plainly [no](#). Sometimes—as in the case of the President’s asserted power to [end birthright citizenship](#)—not even the administration seems to take the claim seriously. A claim like that seems to function less as a legal position to be advanced and more as a sop to the President’s most ardent supporters. The heavy artillery of legal analysis is deployed in vain against a piece of performative politics.

The question now is whether President Trump can declare a national emergency in order to build a wall on the Mexico-U.S. border. The White House announced on Thursday that he intends to do so, after congressional leaders reached a deal to fund the government that did not include the \$5.7 billion in wall funding that the President had sought.

Declarations of emergency are in bad odor in modern constitutional democracies: they evoke the specter of Carl Schmitt, the collapse of the Weimar Republic, and long years of misrule in countless illiberal regimes since. What is more, the U.S. Constitution makes no provision for emergency declarations. And while the Constitution’s guidance is cryptic at best on many separation-of-powers issues, it couldn’t be clearer that Congress—not the President—has the power to appropriate funds. So: can he really *do that*?

The better argument is that he cannot, but it’s not so open-and-shut a matter as you might suppose. The reason is, while the Constitution does not grant the President emergency powers, Congress has done so repeatedly over a period of decades. A declaration of emergency by the President unlocks [over 120](#) statutory provisions that confer extra powers. Many of the provisions are narrowly targeted and modest in scope—one [extends the time for armed services audits](#), for instance—but others are quite sweeping. In a [recent Atlantic article](#), Elizabeth Goitein described emergency powers using language from Justice Robert Jackson’s dissent in the notorious *Korematsu* decision, which authorized the internment of Japanese American civilians in World War II. Every grant of emergency power “lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” In characteristically American fashion, thanks to Congress, we are surrounded by loaded weapons.

The question is whether any of them can be used to build a wall. Most of the emergency provisions do not permit the President to shift appropriated funds around, but a few do. [Margaret Taylor](#) has recently published a detailed analysis of the most likely candidates. These include [10 U.S.C. § 2808](#), which provides that “in the event of ... the declaration by the President of a national emergency ... that requires the use of armed forces, the Secretary of Defense ... may undertake military construction projects ... not otherwise authorized by law that are necessary to support such use of the armed forces.” This provision is fairly restrictive, only authorizing military construction “necessary to support such use of the armed forces.” No one argues that we need a wall in order to support the deployment of troops at the border.

33 U.S.C. § 2293 is perhaps a better bet: it permits the Secretary of the Army to “apply the resources of the Department of the Army’s civil works program, including funds, personnel, and equipment, to conduct or assist in the construction, operation, maintenance, and repair of authorized civil works, military construction, and civil defense projects that are essential to the national defense,” when the President declares a national emergency “that requires or may require use of the Armed Forces.” This provision is less restrictive in how the funds may be used, but it still requires a national emergency that requires or may require the use of military force. And this brings us to the central problem with the President’s plan: there is no national emergency of the sort needed to trigger these provisions.

[As Elizabeth Goitein has argued](#), the facts of the past few months refute any claim that the President is responding to an emergency on the border. Congress enacted emergency provisions so that the President could act with dispatch in the face of crises that move faster than the legislative process can. President Trump is invoking emergency powers in response not to a new and exigent threat, but to a political defeat months in the making. Since December, the President has been negotiating with congressional leaders for wall funding. He precipitated a shutdown to increase pressure on the Democrats, but ultimately had to back off. It was when the legislative process finally failed to yield him the funding that he sought for a second time that he signaled this change of course. The President’s failure to deliver on his campaign promise to build a wall may amount to a political emergency for him, but that is not what Congress had in mind.

If the President goes forward with this plan, it will find its way before the courts. While American courts are often deferential to the executive branch when national security is involved, the less credible they find the administration’s national security story, the less likely they are to defer. Under the [National Emergencies Act](#), a framework statute for emergency declarations, Congress will have the opportunity to disapprove the emergency declaration in half a year’s time. But judging by Senate Majority Leader Mitch McConnell’s statement approving of the plan today, the Republican-controlled Senate is unlikely to oppose the President’s move.

It’s not the case that American Presidents don’t declare emergencies: As the Brennan Center has [documented](#), they have declared almost 60 in the last 40 years. But it is not part of our constitutional tradition—or any healthy constitutional tradition—for Presidents to declare emergencies when they can’t get what they want through

the political process. This move reflects the indifference or hostility to constitutional norms that has become a hallmark of the Trump presidency.

